No. 16565

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

GREAT FALLS EMPLOYERS' COUNCIL, INC., RETAIL FOOD DEALERS DIVISION, AND ITS MEMBER EMPLOYERS, BUTTREY FOODS, INC., SAFEWAY STORES, INC., PAUL A. MATTEUCCI, d/b/a MATTEUCCI'S SUPER SAVE MARKET, PAUL A. MATTEUCCI, d/b/a SOUTHGATE SUPER SAVE MARKET, JOHN EUSTANCE, d/b/a WHITE HOUSE GROCERY, ROBERT NOBLE AND JOHN H. NOBLE, d/b/a NOBLE MERCANTILE COMPANY, E. R. FJELSTAD, d/b/a AL'S FOOD MARKET, AND WALLACE ANDERSON, d/b/a WALLY'S SUPERETTE, Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENTS

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENTS

JURISDICTION

No issue is raised by the respondents respecting jurisdiction of either the National Labor Relations Board or the United States Court of Appeals for the Ninth Circuit. Jurisdictional facts were stipulated. (R. 27-28)[1]

STATEMENT OF THE CASE

The statement of the case set forth in appellant's brief (B. 1-8) is sufficiently precise as to require modification in only six (6) particulars:

1. Counsel for appellant state: ". . . After voting to reject the proposal, the membership also voted to strike one employer-member of the Council, authorizing its Executive Board to determine which employer would be struck. (R. 74; 31) The union members were warned of the possibility of a lockout by the Council members not struck . . ." (B. 3-4).

The language selected by counsel for appellant implies a specific vote by members of the union conferring authority on the Executive Board to select the employer to be struck and implies a specific warning that a lockout was to be anticipated. Such is not the case. The stipulated facts are as follows:

> ". . . At a meeting of the Union on that evening, the Union elected to reject the Council's final proposal. Thereupon the Union voted to strike one employer-member of the Council, and its Executive Board made the determination that the Union would strike Buttrey

[1] References to the printed record are designated "R." References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence. References to the brief of appellant are designated "B."

Foods, Inc. The Union advised its members that in the event of a lockout, all locked out employees should register with the Montana Employment Service . . ." (R. 31).

2. The date, "Saturday, April 12" (B. 4), should be modified to read "Saturday, April 13" (R. 74). The date "Monday, April 12" (B. 5), should be modified to read "Monday, April 15" (R. 75).

3. Counsel for appellant delineate the motives or reasons for the employer action complained of as follows:

> "The Council considered the employee claims to be an effort to make 'an unprincipled use' of the compensation fund as a strike fund. It also considered their possible allowance to be contrary to the declared public purpose of the compensation fund to 'benefit persons unemployed through no fault of their own' (R. 76, 83; 33, 55-56)," (B. 5-6).

This statement of counsel omits reference to other factors weighed by respondents before undertaking the course of conduct which is the subject of the Board's charge. The stipulated facts and findings of the Board assign additional reasons or motives:

> ". . . Respondents, 'taking notice of prior decisions' of the Commission and 'being advised that a direct protest and definitive appeal would take from weeks to years and that compensation might nevertheless be paid pending the appeal,' then admittedly sought effectively to frustrate what they claimed to be 'an unprincipled use' of the unemployment fund as a strike fund . . ." (R. 76; 33).

4. Counsel for appellant have inferred matters from the stipulated facts and the findings of the Board which are not factual, in stating: ". . . Thereafter, without waiting for an initial determination by the Unemployment

Compensation Commission of the merits of the claims and the public policy involved, . . ." (B. 6).

No "initial determination," as defined by applicable Montana Law (R. 53-54), was made respecting the merits of the unemployment compensation claims filed, in this instance, by employees. No determination of any kind was made respecting the merits of such claims until the strike-lockout had ended and work was resumed. In this instance, Charles Peterson, the Supervising Claims Examiner or "Deputy," referred his findings of fact to the Montana Unemployment Compensation Commission for the rendition of a "decision," all in keeping with the provisions of Sections 87-107 (b) and 87-106 (d), *Revised Codes of Montana*, 1947 (R. 52-54, 56-66). The strike-lockout was settled on 24 April 1957, a settlement memorandum was executed on 26 April 1957 and the employees returned to work on 27 April 1957 (R. 39-40). The report of the "Deputy" to the Commission was not made until 14 May 1957 (R. 56) and the first determination respecting the merits of the claims for unemployment compensation was rendered by the Commission on 24 May 1957 (R. 40).

5. The monetary figure of "$16" (B. 6) should be changed to read "$15.00" (R. 33).

6. Both the Board in its findings of fact (R. 77) and counsel for appellant in its statement of the case (B. 7) erred in stating that ". . . the union immediately informed Council by letter delivered April 20 that it would consider any further locking out of the recalled employees to be an unfair labor practice under the Act . . ." Union's

letter was delivered to the individual employers on 20 April 1957 (R. 35); it was not received by Council until 22 April 1957 (R. 50), after the second lockout had been effected.

ARGUMENT

I. SUMMARY

The argument of respondents will be directed to the following five (5) matters:

A. Judicial review of determinations by the National Labor Relations Board.

B. The asserted violations of Section 8(a)(1) of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C.A. Secs. 151, et seq.) referred to herein as the Act.[2]

1. Efforts by employees to procure unemployment compensation payments are not "concerted activities" within the meaning of Section 7 of the Act.
2. Admitting, arguendo, that efforts of employees to procure unemployment compensation payments are "concerted activities," they are not such activities as should be afforded the protection of the Act in derogation of an employer's right to self help.

C. The asserted violations of Section 8(a)(3) of the Act. Encouragement toward or discouragement from union membership cannot reasonably be inferred as a natural consequence of the employer conduct cited.

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[2] Relevant portions of the Act appear in the Appendix of appellant's brief, pp. 19-21.

II. JUDICIAL REVIEW:

Judicial review of determinations made by the Board are governed by Section 10(e) of the Act.[3] Since this cause was submitted to the Board on a stipulated set of facts, no preliminary determination was made by an examiner and the Court now has before it everything which was available to the Board in making its findings and order.

The case presents a factual situation resting in the misty penumbra of the law cast by the Act's open but un-enlightening reference to lockouts[4] and the decision of the United States Supreme Court in the case popularly referred to as the *Buffalo Linen Case*.[5]

In the *Buffalo Linen Case*, the Court failed to endorse the lockout as an absolute corollary to a strike but formulated the premise that in indeterminate circumstances, the lockout should not be denied by the Board to employers, as a means of self help. Having so licensed the lockout, the Court further enjoined the Board and lower courts against a narrow exercise of discretion in permitting employers the use of the remedy.[6]

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[3] Appendix, p. (32).

[4] Section 8 (d) (4).

[5] *NLRB v. Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL*, 353 U.S. 87; 1 L Ed 2d, 676.

[6] 353: "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small

While making a determination of whether the Board correctly balanced the equities in the case at bar, the Court must keep four (4) general principles in mind:

A. Has the Board sustained the burden of proof incumbent upon it, to demonstrate the essential elements of charges under Sections 8(a)(1) and 8 (a)(3) of the Act?

B. Has the Board afforded the evidence proper weight; that is, has it considered respondent's motive in promulgating a lockout and if so, might is reasonably have inferred a lawful as well as an unlawful motive as its germinating force?

C. Are the Board's findings and conclusions supported by substantial evidence on the record as a whole?

D. Do the Board's findings and conclusions rest on erroneous legal foundations?

With respect to the burden of proof required under

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employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult, and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.

* * * * *

353: "The Court of Appeals recognized that the National Labor Relations Board has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown. The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship . . . "

Sections 8(a)(1) and 8(a)(3) it is our opinion that degree is the only basis of distinction between a lockout and a discharge. The former is temporary, the latter permanent. It would appear logical, in consequence, that the elements necessary to sustain a charge of unlawful discharge under Sections 8(a)(1) and 8(a)(3) of the Act should be identical to those necessary to sustain charges based upon an unlawful lockout under the same sections. Before the employer's right to manage and discipline can be declared contrary to these provisions of the Act it must be demonstrated that: (1) ". . . the employer knew that the employee was engaging in some activity protected by the Act . . ."; (2) ". . . the employee was discharged [locked out] because he had engaged in a protected activity . . ."; (3) ". . . the discharge [lock out] had the effect of encouraging or discouraging membership in a labor organization. . . ." [7]

The real question arising here, is whether the seeking of unemployment compensation payments, under these circumstances, is a protected activity. It should be patently obvious, considering the state of the law, that the re-

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[7] " . . . Until there is a reasonable basis in the evidence for making these findings, the employer need not excuse or justify his action . . . When the evidence of the charging party has raised a reasonable inference of discrimination, that inference may still be rendered unreasonable by the employer's excuse or justification . . . so that more evidence must be produced to establish the alleged discrimination . . . " *N.L.R.B. v. Whitin Machine Works*, 204 F 2d, 883 (CA9) (885). The burden is on the Board to prove a prima facie case, *NLRB v. Goodyear Footwear Corp.* 186 F 2d, 913 (CA7).

spondents did not *know*, and still do not *know*, whether the acts of their employees in seeking unemployment compensation was a protected activity. In the absence of some prior determination that a given activity is or is not protected, the burden of proof resting on the Board becomes inextricably mixed with its duty of balancing the equities between employers and employees in reaching a determination as to which employee activities should and should not be afforded the protection of Sections 7 and 8(a)(1) of the Act. Any consideration, then, of whether the Board has fairly met the burden of proof incumbent upon it must then be deferred until its extension of the Act's protection has been tested.

In the consideration of charges arising both under Section 8(a)(1) and Section 8(a)(3), motive and other inferences which may be gleaned from the evidence bear materially on whether the findings and conclusions of the Board are supported by substantial evidence.

> "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where findings are supported by substantial evidence, that evidence is possessed of genuine substance. . . ." [8]

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[8] *NLRB v. Huston Chronicle Pub. Co.*, 211 F 2d, 848 (CA5) (854-855).

With respect to the 8(a)(1) charge, there is no positive evidence in the record revealing the motive of the respondents in effecting the second lockout of 20 April 1957. It is clear, however, that the purpose of the lockout was to prevent the payment of full unemployment compensation benefits pending a final determination. The Board, however, finds ". . . This conduct was not defensive in nature, but instead, was patently in retaliation against the concerted, union directed efforts of these employees to procure unemployment insurance benefits pending settlement of the labor dispute. . . ." (R. 82) By inverse reasoning, it would appear that had the Board inferred from the evidence that the second lockout was defensive in nature, rather than retaliatory, it would have found the lockout to be lawful and thus properly motivated.

We cannot fathom by what reasoning and upon what evidence the Board is justified in raising the inference that respondents' conduct was retaliatory. No more can we understand how the Board failed to conclude, in the face of the evidence, their after the fact advertisement (R. 70), their calm announcement to returning workers that the purpose of the re-call was to cut off compensation (R. 35), and the chronological sequence of events, that respondents' lockout of 20 April 1957 was a defensive shift in tactics precipitated by mass filings for unemployment compensation benefits, which, if granted, could only have served to lengthen the strike by giving the individual participants greater financial security than their union strike benefits alone would have permitted. The logical inferences to be raised from the actions of the respondents

is that they were not only seeking to prevent a misuse of public funds but also to restore labor peace and the usual uninterrupted flow of their businesses within the time limitations normally permitted by the unenhanced resources of both employers and employees. The second lockout was a defensive tactic taken to insure the maintenance of the status quo.

The failure of the Board to raise these inferences is indicative of its failure to weigh all of the evidence, is indicative that ". . . the Board in its decision, starts out by assuming that the respondent company has the burden of disproving the charge . . ."[9] In so doing, it has flagrantly ignored the cardinal principles of interpretation delineated by the Supreme Court.[10]

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[9] *NLRB v. Goodyear Footwear Corp.*, Ante, n. 7, p. 917.

[10] *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L. Ed. 456:

487-488 (467-468): "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record . . . "

* * * * *

" . . . Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo. Congress has merely made it clear that a reviewing court is

The consideration of motive and the problem of reasonable inferences to be drawn respecting the 8(a)(3) charge will be treated together in later sections.

With respect to the four (4) general matters to be considered by the Court in viewing the case as a whole, there remains for consideration general error in law.

In *National Labor Relations Board v. Avery Lumber Co.*, 220 F 2d, 673 (CA8), decided 7 April 1955, the Court said at page 675:

"The Board in seeking enforcement of its order has abandoned its contention that the respondents were not

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not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

490 (468-469): "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

See also: *N.L.R.B. v. Continental Baking Company*, 221 F 2d, 427 (CA8).

entitled to lock out their employees solely for economic reasons in view of the decision of the Ninth Circuit in *Leonard v. National Labor Relations Board*, 205 F 2d 355, and the decision of the Seventh Circuit in *Morand Bros. Beverage Co. v. National Labor Relations Board*, 190 F 2d 576, but it now seeks to sustain its order solely on the ground that the respondents consented to individual employer bargaining and by so doing abandoned their right to act in concert for economic reasons. . . ."

On 20 April 1956, the Supreme Court, in rendering its decision in *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 100 L. Ed. 975, said at pages 112-113 (983):

"The determination of the proper adjustments rests with the Board. Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations. . . ."

On 1 April 1957, the Supreme Court in rendering its decision in *N. L. R. B. v. Truck Drivers Local* (ante), the court said at page 97 (682): ". . . The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship . . ."

Notwithstanding the Board's position in the Avery Lumber case and notwithstanding the principles and admonitions of the Supreme Court in the Babcock & Wilcox and Truck Drivers Local cases, the Board found in this case:

". . . But assuming, arguendo, that such are the consequences, we do not think they constitute those special circumstances which the Board has held, in other cases, entitle an employer to lockout in order to protect his business from unusual economic loss." (R. 84-85).

Having disposed of the lockout of 13 April 1957, by finding it lawful, it would appear that the Board erred in its application of the law by declaring the second lockout of 20 April 1957 unlawful.

III. THE ASSERTED VIOLATIONS OF SECTION 8(a)(1):

(A) Efforts by Employees to Secure Unemployment Compensation Are Not Concerted Activities Within the Meaning of Section 7 of the Act.

Though this point was raised in respondents' presentation to the Board, it was afforded no mention in the Board's findings.

We are aware that concerted activity is deemed to include both union and non-union activity[11] and has even been ruled applicable to efforts of employees to secure collective representation at legislative hearings on a bill to increase benefits under a Workman's Compensation Act.[12] We are aware that employees may band together to procure that to which they are already legally entitled;[13] but we are also aware that concerted activity for unlawful purposes is not that sort of concerted activity contemplated by Section 7[14] and that not all concerted activity is afforded protection under the Act.[15]

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[11] *N.L.R.B. v. Phoenix Mut. Life Ins. Co.*, 167 F 2d, 983 (CA7).

[12] *Bethlehem Shipbuilding Corp. v. N.L.R.B.*, 114 F 2d, 930 (CA1).

[13] *Salt River Val. Water Users Ass'n. v. N.L.R.B.*, 206 F 2d, 325 (CA9).

[14] *N.L.R.B. v. Fansteel Metallurgical Corp.* 306 U.S. 240, 83 L. Ed. 627.

[15] *Joanna Cotton Mills Co. v. N.L.R.B.*, 176 F 2d, 749 (CA4).

The procurement of unemployment compensation benefits is a purely personal, an individual right. Collective actions are not permitted; collective representation is still dependent upon the basic rights of each individual claimant; mass action puts pressure on the State.

In this case, the employees were not legally entitled to compensation (R. 40, 52, 56-66) and in view of the plain prohibition of Section 87-106, Revised Codes of Montana, 1947 (R. 52) it might be said that attempts to procure, or the procurement of, unemployment compensation under the circumstances presented in this case are unlawful.

It is clear that unemployment compensation benefits are collateral to the employer-employee relationship.[16] It should be equally clear that the purpose of the employees in seeking unemployment benefits was not for their mutual aid or protection but their individual aid and protection, and had ". . . no relation to collective bargaining, hours or conditions of work . . ." [17] and thus should not be declared a concerted activity within the meaning of the Act.

(B) Admitting, Arguendo, That Efforts of Employees to Procure Unemployment Compensation Payments Are "Concerted Activities," They Are Not Such Activities As Should Be Afforded The Protection Of The Act in Derogation Of An Employer's Right To Self Help.

We turn now to the question of whether the Board properly balanced the conflicting, legitimate interests of the respondents and their employees. The majority of the Board took the view that after meeting the strike by their original lockout, thus having equalized economic pressure

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[16] *N.L.R.B. v. Marshall Field & Co.*, 129 F 2d, 169 (CA7)

[17] *Joanna Cotton Mills v. N.L.R.B.*, supra n. 15.

by insuring the cohesion of their bargaining unit, the respondents had no further legitimate interests to pursue; that in recalling and again locking out their employees to prevent any potential award of full unemployment compensation benefits, they acted in retaliation and in fact demonstrated that the cohesion of their bargaining unit was not in danger.

With these conclusions we cannot agree, and in our opinion such conclusions are not supported by a substantial quantum of evidence. The rationale of the majority's argument confirms this conclusion. If, as the majority holds, the respondents ". . . demonstrated that they did not believe the multi-employer unit was then in any danger . . ." and that, ergo, their second lockout ". . . was patently in retaliation against the concerted, union directed efforts of these employees to procure unemployment insurance benefits pending settlement of the labor dispute. . . ." (R. 82), why did they, in viewing the entire fabric of the case, declare the original lockout to be a lawful balancing of legitimate interests. If their bargaining unit was in no danger of disintegration, if they were able to meet the economic strength of the union without the lockout, then at the outset they had no legitimate interests to balance against those of their employees in promulgating strike action.

But, the truth implicit in the evidence is that the respondents did have legitimate interests to balance in effecting the original lockout — those of spreading the economic hardship of the strike equally among all employees and employers and maintaining the unity of their

multi-employer group. Moreover, they had a legitimate interest in preserving this status, in meeting the union tactic by tactic, both in the stratum of economics and in the stratum of bargaining power. The employees sought to take advantage of State laws to tip the balance of power in their favor; the respondents took advantage of the same laws in an effort to counter their move.

Both the employees and the respondents were placed on the horns of a dilemma by the action and counter-action taken.

Had the employees succeeded in procuring the payment of compensation on an initial determination, they would have received $32.00 per week in addition to union strike benefits until such time as the respondents, opposed by union counsel, had succeeded, if at all, in procuring a determination through administrative and court appeals that the employees were not entitled to such benefits, as participants in a labor dispute. Had the employers failed, funds in which they had a special interest, if not their own funds, would have been used against them, both during their endeavors and after failure, to finance and perpetuate the labor dispute; and, additionally their rate of contribution to the fund, in the future, under Montana's merit rating system, would have been increased. Assuming success by the employers on appeal, employees would nevertheless have had the benefit of compensation pending appeal, with the attendant augmented ability to prolong their economic pressure on respondents; and, even though benefits so paid would not have been charged to the specific accounts of respondents, they would have been

charged to the general unemployment compensation fund to which these respondents contributed and in which they have a specific interest. Finally, it must be noted in passing, that persistent charges to the general fund, which may tend to reduce it below that level at which all employer contribution rates are raised to the maximum, presented respondents with the prospect of increased payments even if they won their determination. (R. 95-97; 32-33, 52-54). Faced with these alternatives, the respondents felt that the payment of $16.00 per week in return for some work, would be better than the payment of $32.00 per week for no work.

By the employer counter-action, employees were placed in the anomalous position, under the State laws, of either accepting the $16.00 per week or disqualifying themselves from all benefits as either economic strikers or persons declining work (R. 33-34, 52-54). It must be noted here that employees recalled to work were advised that the purpose of the recall was to forestall the payment of unemployment compensation.

So it would seem, that the employers did have legitimate conflicting interests which they sought to balance against those of the employees through the exercise of self help. But, the majority of the Board, contrary to the mandate of *N. L. R. B. v. Truck Drivers Local 449*[18] seems to require some unusual economic hardship or loss to the respondents before it would balance the equities, and it contends that the respondents have no real interest in unemployment

[18] Ante, n. 5.

compensation funds, therefore, they suffer no economic loss whether such funds are properly or improperly disbursed. We think the contrary is evident.

In *Chrysler Corporation v. Smith*, 298 N.W., 87 (Mich., 1941), the plaintiff intervened in proceedings before the Michigan Unemployment Commission in an effort to prevent the payment of unemployment compensation to its striking employees. The right of the state courts to enjoin the payment of compensation on an initial determination and pending final appeal (a provision similar to that of Section 87-107 (b) Revised Codes of Montana, 1947)[19] and the right of the plaintiff Chrysler Corporation to appear in the case and protest payment were contested. The court enjoined payment declaring this section of the law unconstitutional, and permitted the appearance of Chrysler Corporation. With respect to the latter matter, the court said (pp. 92-93):

> "Claimants question the right of the Chrysler Corporation to appear and contest their right to awards. This requires but short answer. As a contributor to the fund, having an interest in its proper disbursement, it was the right of the corporation, if not its duty, to see that the purpose and full integrity of the fund was preserved."

In passing, the comments of the Michigan Commission, quoted in the case, are worth noting.[20]

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[19] R. 52-53.

[20] 90: " . . . The unemployment compensation fund should never be used to finance claimants who are directly involved in a labor dispute, nor should it ever be denied to claimants who are legally entitled to receive benefits. This fund is in many respects

The problems raised in *Chrysler Corporation v. Smith* (supra) were further pursued in *Chrysler Corporation v. Appeal Board of Michigan Unemployment Compensation Commission, et al.*, 3 N.W. 2d, 302 (Mich., 1942) and the principles of the Smith case iterated above were upheld.[21] Petition for Writ of Certiorari to the Supreme Court of the United States was denied on this case.[22]

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a public trust fund and all who have custody [of] or control over it are in reality trustees who must at all times administer the fund in strict compliance with the provisions of the law. None of the money accumulated in this fund should ever be disbursed for the purpose of financing a labor dispute nor should it be illegally withheld for the purpose of enabling an employer to break a strike . . . "

[21] 304: "While it scarcely seems necessary, it may be noted that the fundamental reason for holding the double affirmation provision invalid, in the aspect now under consideration, is that otherwise the controverted issue of claimants' right to be paid compensation would in effect be finally decided and the compensation paid without affording an adverse party any opportunity whatever to have obtained a judicial determination of the rights of the respective parties; and thereby the party contesting the employees' claim to compensation would be deprived of the right to due process which is afforded by both the State Constitution and the *Federal Constitution, Const. Mich.*, Art. 2, § 16; *Const. U.S. Amend*, 14, whenever the controversy involves property rights. That the Chrysler Corporation has a property right in the unemployment compensation fund and in its just administration was also passed upon by Mr. Justice Wiest's opinion in *Chrysler Corporation v. Smith*, supra, wherein it was said: 'Claimants question the right of the Chrysler Corporation to appear and contest their right to awards. This requires but short answer. As a contributor to the fund, having an interest in its proper disbursement, it was the right of the corporation, if not its duty, to see that the purpose and full integrity of the fund was preserved.'

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In *Tube Reducing Corporation v. Unemployment Compensation Commission, et al.*, 62 A 2d 473 (N.J., 1948), the questions respecting the constitutionality of provisions for the payment of immediate benefits pending appeal and an employer's right to prosecute a writ of certiorari to review a commission decision, the same questions as involved in the Smith case (supra), were brought before the courts of New Jersey and the same results were reached as in Michigan.[23]

"In respect of his right and duty to have only lawful use made of the unemployment fund, the assessed employer is in substantially the same position as the ordinary taxpayer relative to public moneys acquired by taxation being used for lawful purposes only . . . "

[22] No. 203, 317 U.S., 635, 87 L. Ed. 512, 12 Oct. 1942.

[23] 474: " . . . The policy of section 43:21-6 (b) (1) becomes readily apparent when considered in the light of the legislative purpose to provide immediate relief to the victims of involuntary unemployment. It has reference only to the initial proceeding for benefits brought by the employee. Here, the payments became chargeable to the respondent employer when made; and so the employer had an interest sufficient to challenge the adverse action below."

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474: " . . . The provision for charging the benefits paid against the employer's account gave rise to a special and peculiar interest sufficient in itself to invest the respondent employer with the right of review by certiorari. . . . "

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474: "The protection of the general or common interest rests with the public authorities. But in these circumstances the interest of the employer is something more than 'a common concern for obedience to law.' . . . "

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475: "Moreover, the essential design of the statute is, as we

The unemployment laws of California, Michigan, New Jersey and Kentucky are, as may be observed from cases quoted, similar to those of Montana. If the respondents in this matter had secured an injunction against the payment of unemployment compensation to their employees, would the majority of the Board have held such action to violate Section 8(a)(1) of the Act? Of what does the Board complain, the remedy or the result? Under

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have seen, the provision of relief against involuntary unemployment, and, in the furtherance of this purpose, to withhold benefits where the work stoppage is due to a labor dispute, unless the employee 'is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work.' R.S. 43:21-2, 43:21-4, 43:21-5, N.J.S.A. Thus, the policy of denying access to the fund as a means of sustenance to those unemployed because of participation in a labor dispute is outstanding; and it would seem to be axiomatic that the employer also has a special interest sufficient to justify his interposition to prevent the use of the fund, created to relieve unemployment that is in fact involuntary, and made up in substantial part by his contributions, R.S. 43:21-7, N.J.S.A., for the advancement of the interests of the adversary parties to the labor controversy, and so to preclude misuse of the fund constituting in effect governmental intervention in aid of a party to a labor dispute in violation of the clear legislative policy."

See to the same effect:

N. J. Zinc Co. v. Board of Review, 135 A 2d, 496 (N. J.) *Babb v. Bullitt, et al.*, 220 SW 2d, 394 (Ky): " . . . we . . . say that if employers generally are so related to the unemployment problem that they can be required by a moderate tax to pay into a fund to be administered for the benefit of the unemployed, that it necessarily follows that they are not so unrelated to the problem as to permit an indiscriminate payment of benefits out of the reserve solely created and maintained by that employer without any right to be heard . . . "

the rationale of the Board's decision, the result would have been the same, the respondents would have interfered with and restrained the exercise of concerted activities of their employees.

The majority of the Board expressed concern respecting dicta found in the Gullett Gin case,[24] particularly that:

> ". . . The Board's power to find and to remedy unfair labor practices ought not to 'hinge on the myriad provisions of state unemployment compensation laws.' For, as the Supreme Court had held in a slightly different context but in language we think applicable here, 'any failure of respondent to qualify for a lower tax rate would not be primarily the result of federal but of state [unemployment compensation] law, designed to effectuate a public policy with which it is not the Board's function to concern itself.' " (R. 85-86).

The holding of the *Gullett Gin* case was simply to the effect that unemployment compensation received by employees was a collateral benefit which need not be deducted from a back pay order, the court having affirmed the right of the Board to make such orders.

But, the fear of the majority may well be realized, for the Board, in balancing the conflicting legitimate interests of employees and employers must examine each case on its own merits and rest its decision on a substantial quantum of the evidence. In the light of these circumstances, it may well be called upon to consider many state laws and to consider the problem of judicial restraints sought by employers, as posed above. How much more simple it would have been for the Board to declare that

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[24] *N.L.R.B. v. Gullett Gin Co.*, 340 U. S., 361, 95 L. Ed. 337.

activities of employers in seeking the collateral benefits of unemployment compensation were not protected activities. After all, an employee can seldom, except in the peculiar circumstances submitted by this case, be discriminated against for seeking such benefits unless it be with respect to discrimination in hiring, and the likelihood of such discrimination is improbable. The dilemma posed to the striking employees in this case is faced weekly, during the winter season, by construction workers — to take one day's work and give up one week's benefits. The remedy rests with the State legislature. It is not for the Board to compel the payment of full wages or, in the alternative, full unemployment compensation benefits. This is a matter of State law.

Based on the cases cited herein, we can reach no conclusion other than that the Board erred in law in finding that some economic loss or hardship must be suffered by employers *before* they have any legitimate interests, in conflict with those of their employees and requiring a balance in these circumstances. Should our conclusion in this respect be in error, we must conclude, in the light of such cases, that the Board erred in law in failing to find that the respondents do have a direct and substantial interest in unemployment compensation funds, which, if impaired might result in serious loss directly as concerns the depletion of their individual accounts and increased rate of contribution; indirectly as concerns the depletion of the general fund with a potential increase in general contribution levels; indirectly as concerns the depletion of public funds in which they have an interest; and, in-

directly insofar as it would permit recipients to prolong the labor dispute with continued direct economic loss in the form of resulting decreased business.

We conclude that the Board erred in its interpretation of the evidence and failed to base its conclusions on the very substantial evidence in the record that respondents had sufficient interest in the legitimate ends of the course of conduct undertaken by their employees, to permit self help of the type exercised.

We submit that the activity of the employees in seeking unemployment compensation under the facts involved in this cause is not an activity protected by the Act[25] and that therefore, the Board has failed to sustain the burden of proof incumbent upon it under the principles of *N. L. R. B. v. Whitin Machine Works.*[26]

IV. THE ASSERTED VIOLATIONS OF SECTION 8(a)(3):

Encouragement Toward Or Discouragement From Union Membership Cannot Reasonably Be Inferred As A Natural Consequence Of The Employer Conduct Cited.

Not all discrimination in employment and not all manipulation of the tenure, terms or conditions of employment are unfair labor practices under Section 8(a)(3) of the Act. The discrimination or manipulation must in fact relate to the employer-employee relationship and must encourage or discourage membership in a labor organiza-

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[25] *International Union, UAW v. Wisc. E.R.B.*, 336 U.S., 245, 93 L. Ed. 651.

N.L.R.B. v. Jones Laughlin Steel Co., 300 U.S., 1, 81 L. Ed. 893.

[26] Ante, n. 7.

tion. The principles pertaining to the application of Section 8(a)(3) are set forth in detail in *Gaynor News Company v. N. L. R. B.*, 347 U.S. 17, 98 L. Ed. 455,[27] and *N. L. R. B. v. J. I. Case Co. Bettendorf Works*, 198 F 2d, 919 (CA8).[28]

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[27] 39: " . . . But the scope of the 'membership in any labor organization' is in issue here. Subject to limitations, we have held that phrase to include discrimination to discourage participation in union activities as well as to discourage adhesion to union membership."

40: " . . . Thus §§ 8(a) (3) and 8(b) (2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood . . . "

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42-43: " . . . Thus this section [8(a) (3)] does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

43: "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a) (3) and its predecessor. In the first case to reach the Court under the *National Labor Relations Act*, *N.L.R.B. v. Jones & L. Steel Corp.*, 301 U.S. 1, 81 L. ed. 893, 57 S Ct 615, 108 ALR 1352, in which we upheld the constitutionality of § 8(3), we said with respect to limitations placed upon employers' right to discharge by that section that 'the [employer's] true purpose is the subject of investigation with full opportunity to show the facts.' In another case the same day we found the employer's 'real motive' to be decisive and stated that 'the Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees.' Courts of Appeals have uniformly applied this criteria, and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of vio-

lation of this section. Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of § 8 (a) (3) . . . "

44-45: "But it is also clear that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a) (3) . . . Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct . . . Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established. . . . "

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46: " . . . In holding that a natural consequence of discrimination, based solely on union membership or lack thereof, is discouragement or encouragement of membership in such union, the court merely recognized a fact of common experience—that the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action. . . . "

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48-49: " . . . An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. . . . "

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51: "Encouragement and discouragement are 'subtle things' requiring 'a high degree of introspective perception.' . . . But, as noted above, it is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action. Moreover, the Act does not require that the employees discriminated against be the ones encouraged for

purposes of violations of § 8(a) (3). Nor does the Act require that this change in employees' 'quantum of desire' to join a union have immediate manifestations."

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56: " . . . In many cases a conclusion by the Board that the employer's acts are likely to help or hurt a union will be so compelling that a further and separate finding characterizing the employer's state of mind would be an unnecessary and fictive formality. . . . "

56: "Of course, there will be cases in which the circumstances under which the employer acted serve to rebut any inference that might be drawn from his acts of alleged discrimination standing alone. . . . "

28 921: "The test which must be applied to the situation is one which we have only recently emphasized—'There can be no violation of (section 8(a) (3)) unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization.' *N.L.R.B. v. Webb Const. Co.*, 8 Cir., 196 F. 2d 702, 706. And that proximate and predictable effect, as a basis for a finding of violation, must have at least some evidentiary foundation in probative circumstances or testimony. Cf. *N.L.R.B. v. International Brotherhood*, 8 Cir., 196 F. 2d 1. It must be kept in mind that what is now being considered is not a question of the latitude of judgment which the Board may exercise in remedy for a particular violation but whether there exists any basis for a finding of a particular violation as a fact. Not much evidentiary basis, to be sure, is required for a Board's finding, but there must at least be something on which an inference can be said to be rationally predicated, in a consideration of the record as a whole."

922: "We do not believe that the mere discharge of a union member, which happens to be wrongful on some other ground under the Act but which has been made without the existence or any reasonable implication of a union basis or motive, is entitled, without more, to be found to constitute a violation of section 8(a) (3). Some color of setting or special circumstance, we think, must ordinarily exist in the particular situation which reasonably gives the discharge a union and not a mere general connotation and which is likely to have a curbing union effect. . . . "

In this case, it is our opinion that the Board has made a bald conclusion, unsupported by any positive evidence in the record, or any reasonable inference from any evidence in the record that:

> "Thus we hold on the facts of this case that Respondents' action in locking out their recalled employees on April 20, 1957, was a manipulation of tenure and terms of employment which infringed upon the collective bargaining rights of these employees and tended to discourage support of the Union and concerted activity for mutual aid or protection in violation of Section 8(a)(3) . . . of the Act. Where, as here, the discrimination had the natural tendency to discourage union membership or activity, specific evidence of anti-union animus and intent to cause such discouragement is not a prerequisite to finding a Section 8(a)(3) violation, as Respondents contend. This is nothing more than an application of the familiar common law rule which holds a man accountable for the foreseeable consequences of his own conduct." (R. 86).

We fail to understand how cutting off unemployment compensation benefits can make a good, bad or indifferent union member or raise or lower the threshold of an employee's desire to become or to refrain from becoming a union member, even though a union has advocated the solicitation of such benefits. It may be reasonably inferable that were a union to supply free legal counsel in the procurement of such benefits, for its individual members, that such a lure would entice membership. But there is no such evidence here; and, were such the case would protests to claims prosecuted by such counsel encourage withdrawal from the union?

It is not apparent to us that the action of respondents

in this instance may be characterized as inherently encouraging or discouraging to membership. To say that the ordinarily reasonable and prudent man could foresee that his efforts in cutting off unemployment compensation might encourage or discourage union membership carries the principle of proximate cause beyond the bounds of its normal elasticity. Again, it might be said in *retrospect,* that had these respondents taken no action to interfere with their employee's claims, through self help, legal recourse or otherwise, and simply have permitted their payment, there might have occurred a tremendous surge of membership thereafter. But, they did not so refrain, and we must examine their affirmative conduct.

The long, and currently extant, course of dealing between these respondents and the union representing their employees (R. 29-30, 39-40) militates against any motive or desire on the part of these respondents to discourage membership in the Retail Clerks Union.

We cannot, by any stretch of logic, reasonably conclude from the evidence on hand that the proximate and predictable effect of the respondents' action in this case would be an encouragement or discouragement of union membership. Certainly, had the respondents procured an injunction against payment, had they just left their employees idle, without recall, they might have discouraged union membership far more than it is conceivable they did in this instance. Sixteen dollars per week is better than nothing.

We submit that in the light of the tests set out in the

Bettendorf Works case and *Radio Operations* cases,[29] the Board erred both in law and in finding that a substantial quantum of evidence supported a violation of Section 8(a)(3) of the Act in this instance.

CONCLUSION

It is respectfully submitted that the Court should decline to issue any decree enforcing any portion of the Board's order.

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January, 1960

[29] Ante, n. 27, 28.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.), are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (e).

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The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

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